IN THE

Supreme Court of the United States

October Term, 1946.

No. 235.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE,

REPLY BRIEF FOR STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

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Statement of Case.

In the interest of exactness and clarity and in order that there may be no possible misapprehension as to the precise nature of the relief originally sought by the United States or of the precise nature of the trial court's findings upon which the judgment was based, we make certain additions to the Statement of the Case as set forth in petitioner's brief.

In paragraph VIII of the complaint [Tr. p. 4], the plaintiff alleged three things which were claimed to constitute the loss suffered by plaintiff as a result of the injuries to the soldier, John Etzel: (1st), that the services of John Etzel were lost to the plaintiff during the time he was incapacitated; (2d), that the plaintiff became

liable to pay, and did pay, to John Etzel his compensation during said period of incapacity; and (3d), that the plaintiff expended for hospital care a certain sum during said period of incapacity. At the trial no proof was made nor offered as to what was the value of the services of John Etzel to the plaintiff.

In response to these allegations, the court found in paragraphs VI and VII of the Findings [Tr. pp. 29, 30] that John Etzel was incapacitated and his services as a member of the Armed Forces were lost to plaintiff for the period alleged; that the plaintiff was obligated to pay, and did pay, to John Etzel wages during his incapacity in the sum of $69.31 and that said last mentioned sum was the fair and reasonable value of the services lost by plaintiff during Etzel's period of disability. There was no evidence offered to prove this last finding or upon which it was or could be based. As we shall hereafter point out, the compensation accruing to Etzel during his disability constituted *his* loss of earnings. The foregoing finding was an attempt to measure the plaintiff's loss, if any, in the loss of earnings of the injured man. This left the hospital expenses, and as to these, the court merely found that the plaintiff was obligated to, and did, provide them and that the sum paid was the fair and reasonable value of the hospitalization furnished. The findings frankly and properly recognized that hospitalization forms no part of the value of the services lost by plaintiff. Under the findings, they could not be because the court found that the wages paid to Etzel was the fair value of the services lost by plaintiff.

We point out also that this action was initiated upon the theory that the soldier, John Etzel, was the servant

of the plaintiff. Thus, in paragraph III of the complaint [Tr. p. 2] it was alleged that John Etzel was "an enlisted man in the armed forces of the United States government, and the servant of the plaintiff." Again, in paragraph VIII of the complaint [Tr. p. 4] it was alleged that at the time of the accident and prior thereto "John Etzel, the servant of the plaintiff, was an able bodied man," etc. This basic premise that John Etzel was a servant of the plaintiff was implicit and apparent in the presentation and argument of this case in the District Court but was rejected by the trial judge in his opinion and also in the findings. The trial judge declined to find that the injured soldier was a servant of the plaintiff [Tr. p. 28]. Although paragraph III of the findings above cited contained a note stating that the finding that the soldier was a servant of the plaintiff was stricken at the request of counsel for defendants, this is not strictly accurate. The opinion of the trial judge had indicated quite definitely that his conclusion was based merely upon the status which existed between the injured soldier and the government and that he did not subscribe to the master-servant theory. By letter addressed to the trial judge [Tr. p. 26], the above mentioned difference between the findings as originally prepared and the conclusions reached in the trial court's opinion was pointed out and inquiry was made whether the court desired to incorporate a specific finding of master-servant in the findings of fact. Thereupon, the change was made in paragraph III of the findings.

We have, therefore, in this case the rather odd situation of an action originally begun based upon the theory that the relation of master and servant existed between the

injured soldier and the plaintiff—a theory now abandoned. This theory was not accepted by the trial court (in which conclusion we think he was undoubtedly correct) but instead of accepting the master and servant doctrine, the trial court adopted the theory that a status existed between the government and the soldier and that by reason of that status a right of action, heretofore unknown, was created (in which conclusion we respectfully suggest that the Honorable Court was in error).

Presently, therefore, this case has developed so that it necessitates the effort upon the part of the plaintiff to persuade this court to adopt the trial court's theory and to create a new cause of action where none was ever supposed to exist before in this country, based merely upon the premise that a status exists between the plaintiff on the one hand and its soldiers on the other. Under this theory, it would become necessary to disregard the laws of California within the borders of which there occurred the original tort giving rise to a cause of action in the injured man, John Etzel, for damages against the defendant. It would likewise become necessary to ignore the fact that the case was tried within California and presumably under California laws, which unquestionably would permit no recovery by the plaintiff in this action. In short, it becomes necessary for this court to establish a new cause of action unknown to California law, unknown so far as research has discovered, to the other states of the Union, and based upon the claim that even though the master-servant relation does not exist (and the trial court did not find that it did), and even though there is

no federal nor other law warranting it, yet, nevertheless, merely because a so-called status exists between the plaintiff on the one hand and its soldier on the other, therefore the plaintiff ought to have a cause of action.

We proceed, therefore, to examine the applicable law under the following general outline:

1. When the United States goes into court, it does so in general on the same basis as any other litigant and its rights must be determined in the same way and under the same rules as those of any other litigant.

2. The relationship of master and servant does not exist between the government and its soldiers; and in the absence of such relationship no cause of action exists in the instant case for recovery for loss of servi

3. Not only under California law but generally throughout the United States, it is the rule that an injured person has a cause of action against the tort feasor for his lost wages and hospital expense. This action does not rest in the master even though the latter, by reason of contract or otherwise, may have reimbursed his servant for his lost wages and hospital and medical expense. This cause of action of the injured soldier, John Etzel, was satisfied by the payment made to him and was by him released.

I.

When the United States Goes Into Court It Does so in General on the Same Basis as Any Other Litigant and Its Rights Must Be Determined in the Same Way and Under the Same Rules as Those of Any Other Litigant.

It is pointed out by the opinion of the Ninth Circuit Court of Appeal in the instant case that the general rule is that when the United States goes into court to assert a claim it stands on the same footing as any private suitor. Citing *United States v. The Thekla*, 266 U. S. 328, 339, 340; and *United States v. Moscow-Idaho Seed Company*, 92 F. (2d) 170, 173, 174.

This general principle has been enunciated not only in the above cases but in a long line of decisions over a period of many years. The following are some of them:

Curtner v. U. S., 149 U. S. 662;

United States v. San Jacinto Tin Company, 125 U. S. 273;

Cotton v. United States, 11 Howard 229, 13 L. Ed. 675;

United States v. Bank of the Metropolis, 15 Peters 377, 392;

United States v. State National Bank of Boston, 96 U. S. 30.

In the foregoing case of *Curtner v. U. S.*, 149 U. S. 662, in which the United States sought to annul certain listings and certification of lands, the opinion quotes as follows from *United States v. San Jacinto Tin Company*, *supra*:

"But we are of opinion that since the right of the government of the United States to institute such

a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property;".

In the foregoing case of *Cotton v. U. S.*, 11 Howard, 229, it is said:

> "As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have."

Again, in the above cited case of *United States v. Bank of Metropolis*, 15 Peters 392, it was held that when the United States become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments.

Again, in the above cited case of *United States v. State National Bank of Boston*, 96 U. S. 30, it is said concerning an action involving money which had been paid into the United States Treasury by means of a fraud to which a government agent was a party:

> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in nowise involved."

The case of *United States v. Moscow-Idaho Seed Company*, 92 F. (2d) 173, 174, cited in the opinion below of the Ninth Circuit Court of Appeals, is interesting because it also involves a tort case arising out of an automobile collision. There the United States brought suit as plaintiff in an automobile damage case, claiming damages to the automobile of the United States driven by one of its employees, and the court held that the issue should be determined in accordance with rules of law applicable between private litigants.

We believe that the doctrine enunciated in the foregoing cases constitutes the broad, general rule applicable to suits when the United States come into court as a plaintiff. Thus, in Corpus Juris, Volume 65, page 1409, section 183, it is stated that the rights of the United States are ordinarily measured by the same rules as those of a private litigant, and when it brings an action on behalf of a private party it has no higher right than such party.

The cases cited on page 22 of Petitioner's Brief do not affect the general principle but merely illustrate certain exceptions. They do not overturn the case of *Erie v. Tompkins*, 304 U. S. 64 in its decision that federal courts will follow the state courts in the latter's decisions concerning state law. Nor do they overturn the general rule stated above that the United States as a plaintiff stands on the same footing as any other litigant. In each and every one of them, there was involved either the sovereignty of the United States or some specific federal law or treaty which had to be enforced. Thus, in *Board of Commissioners v. United States*, 308 U. S. 343, there was involved the right of the United States to recover,

on behalf of an Indian, taxes, with interest thereon, illegally levied by Jackson County upon the lands of the Indian. The court mentions that the case involves Indian Treaty rights under a certain Indian Treaty and

> "whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas."

Again, in *Deitrick v. Greaney*, 309 U. S. 190, it was held that judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question.

In *Royal Indemnity Company v. United States*, 313 U. S. 289, the questions involved were whether the Collector of Internal Revenue had power to release the obligation of a certain bond filed with him by a taxpayer; and if not, whether the United States is entitled to interest on the amount of its claim against the surety. It was held that the power to release or otherwise dispose of the rights and property of the United States is lodged in Congress and that the Collector of Internal Revenue had no such power. As to interest, it was held that while the New York statute fixing a rate of interest was not controlling, it was, nevertheless, a suitable rate to be allowed.

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U. S. 47. This case cited by petitioner involved the right of the Federal Deposit Insurance Corporation to recover on notes given to an insured bank to enable it to conceal its true condition, which notes, by receipt given therefor, it was agreed would not be called for payment. This was contrary to the policy evidenced

by the Federal Reserve Act and it was held by the decision that the right of recovery should be arrived at in view of the Federal policy to protect the F. D. I. C. and the public funds which it administers against misrepresenttaion as to assets of insured banks.

Clearfield Trust Company v. United States, 318 U. S. 363, merely decided that the rights and duties of the United States on commercial paper which it issues are governed by federal rather than by local law. In this case a check drawn on the United States treasury had been presented to the Treasury and cashed with the name of the payee forged to an endorsement. Even in that case the court says:

> "The United States as drawee of commercial paper stands in no different light than any other drawee. As stated in United States v. National Exch. Bank, 270 U. S. 527, 534, 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees 'by the largeness of its dealings and its having to employ agents to do what if done by a principal in person would leave no room for doubt.'"

United States v. Allegheny County, 322 U. S. 174, involved the immunity of the federal government from taxation. The United States owned certain machinery located in buildings on land owned by another. Allegheny County added the value of the land and machinery and thereby arrived at a total assessment. It was held that whatever the practice might be in Allegheny County, this could not be done for it was in reality levying a tax on the federal government's machinery and this was unlawful.

Lastly, the case of *Holmberg v. Armbrecht*, 327 U. S. 392, was a suit in equity to recover an assessment against

a stockholder of a joint stock Land Bank who had apparently concealed his ownership of any of the stock. It was held that the case concerned not only a federally created right but a federal right for which the sole remedy was in equity and that equity need not follow state statutes of limitation. In fact, the decision calls attention to the fact that even if there had been a federal statute of limitation for bringing suit, nevertheless the time would not have begun to run until after the petitioners had discovered, or had failed with reasonable diligence to discover the alleged deception by the stockholder which formed the basis of the suit.

Thus each and every of the cases cited by petitioner in an attempt to show that in this particular case the United States does not come into court on the same basis as any other litigant, involved either a treaty or a federal statute giving certain rights or involved some federal immunity as to taxation.

No such situation exists here. There is no federal statute giving the United States a cause of action. It is significant and is pertinently pointed out by the Ninth Circuit Court of Appeals, near the end of its opinion in this case, that although Congress has provided in certain other situations, similar to this, that the Government should have certain privileges of assignment or subrogation, nothing of that sort has been done concerning cases such as the one at bar. In the opinion it is said:

> "Furthermore, it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages. It will be noted that Congress has provided that the government should have the privileges of assignment or subrogation in

other and somewhat similar situations. In the Federal Employee's Compensation Act, 5 U. S. C. A. §§751-800, it is provided that before benefits may be received the government may require the beneficiary to assign to the government his rights against the negligent party or to prosecute the action in his own name. (See §776.) And by §797 members of the Officers' Reserve Corps and the Enlisted Reserve Corps of the Army are in time of peace made subject to and given the benefits of the Act. Also the World War Veteran's Act, 38 U. S. C. A. §§421-576, makes similar provisions (§502) with regard to any cause of action that a person entitled to benefits may have against a third person. Cf. The Steel Inventor, 36 F. (2d) 399.

> "In our opinion authority for this action should come through legislation, and not from an attempt by the courts either to enlarge the scope of an ancient common law cause of action, or to create a new one."

Petitioner's brief refers to the fact that the National Government derives its authority to raise an army from the federal constitution. This, however, is a far cry from pointing to any federal statute which authorizes such a suit as this when, as we shall hereafter show, no other litigant would be entitled to recover, whether he did or did not sustain the relation of master to the injured person.

It might with equal force be argued that if the federal government should pass a law authorizing universal compensation and medical expenses to injured citizens, then in all such cases of tortious injury to a citizen, and without any legislation authorizing it, the Government would have a right to recover from a tort feasor the amounts expended by it for compensation and medical

expense. After all, a status exists between the government and its citizens just as it exists between the government and its soldiers and no more cogent reason would seem to exist in the one case than in the other why the federal government should have a cause of action without legislation authorizing it. To be entirely accurate it should be recognized that the real status which exists is that between the government and the citizen, for in becoming a member of the armed forces the soldier is merely performing one of the duties which he owes to his government in his status as a citizen.

II.

The Relationship of Master and Servant Does Not Exist Between the Government and Its Soldiers, and in the Absence of Such Relationship No Cause of Action Exists in the Instant Case for Recovery for Loss of Services.

Petitioner seems now to have receded from the position earlier assumed in this case and no longer insists that the relation of master and servant existed between the plaintiff and its injured soldier. This may be due to the fact that the general trend of the decisions seems to be that a soldier is not acting as an employee or servant of his government but is performing his duties in an entirely different capacity. He is performing his general duties as a citizen to defend and protect his country. It is doubtful if any federal case will be found laying down the postulate that the relation of master and servant corresponds to the relationship of the government and its soldiers. Even in the case at bar, the District Court rejected that idea. The question has several times been

considered in the state courts. In the case of *Goldstein v. State*, 281 N. Y. 396, 24 N. E. (2d) 97, there was involved the relation of a state militia man to the State of New York. The state court, after discussing at some length the rights, duties, and liabilities as between the state and its militia or soldiers (as members of the militia are certainly members of the armed forces), reaches this conclusion:

> "It seems clear that one who joins the state militia and is engaged in active service therein is in no sense an employee of the state. He is simply performing a duty which he owes to the sovereign state as a resident and citizen. It makes no difference whether he does that voluntarily in time of peace or in response to the call of the governor in time of trouble."

In Illinois a similar conclusion was reached by the Supreme Court of that state in the case of *Hays v. Illinois Terminal Transportation Company*, 363 Ill. 397, 2 N. E. (2d) 309. There the court says:

> "The relation between the state and those who are in voluntary military service is essentially different from the relation which obtains between master and servant."

A similar conclusion was reached by the Supreme Court of Nebraska in the case of *Lind v. Nebraska National Guard*, 144 Neb. 122, 130, 12 N. W. (2d) 652.

Cogent support is given to these authorities by the opinions of this court in *Selective Draft Law* cases, 245 U. S. 366, and in *United States v. Schwimmer*, 279 U. S. 644, wherein it is in substance held that a citizen, in rendering military services in time of war, is merely performing a duty which rests upon him as one of the obligations of

citizenship. Thus, in the *Selective Draft Law* cases, it is said:

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."

It belittles the relation between the Government and its soldiers to say that it is merely the relation between a master and his servants. The relation is something greater and higher than this. The government, on the one hand, is exacting the last high measure of devotion from its citizens when it requests their entry into the army, and, on the other hand, the soldiers are performing the supreme duty of the protection and defense of the nation, at once a privilege and a sacrifice, even, perhaps, to the extent of life itself. Something of this view is set forth at the end of the opinion in the Draft Law cases, referring to the "exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people."

So far as we are aware, whenever the question has arisen in the federal courts of this country whether a soldier is merely a servant and whether the United States, in a case similar to this, is entitled to recover, the answer has been in the negative, except only in the District Court below. Thus, in *United States v. Atlantic Coastline R. Co.*, 64 Fed. Supp. 289, it was held that there was no cause of action in the government to recover the cost of hospitalization, nursing care, and wages paid

to an injured sergeant whose injuries had been caused by the tortious act of the defendant. The opinion holds that the relation existing between the government and the soldier was not that of master and servant and was not such as to give rise to any cause of action in the government to recover its expenditures.

A similar conclusion was reached as to an injured civilian Conservation Corps enrollee in *United States v. Klein*, 153 Fed. 55.

The only opinion, so far as research has discovered, holding that any liability exists is that of the District Court in the instant case where, as we have pointed out, the trial court rejected the master-servant relationship although, in effect, inventing a new cause of action based upon status.

The idea of a master and servant relationship has also been rejected in the British Dominions. In Australia, was decided the case of *Commonwealth v. Quince*; originally decided in the Supreme Court of Brisbane and reported in Queens Law Reporter on August 28, 1943, page 91, and later, upon appeal, the opinions appeared in the Argus Reports, 50 *et seq.* and 68 Comm. L. R. 227. That case is almost identical with this and recovery was denied, except that the Commonwealth was permitted to recover the value of its property, the clothing worn by the airman, which was destroyed in the accident. In the original opinion in that case the following pertinent language appears:

> "I think it is not competent for a judge to invent a new liability arising out of some status which is not that of parent and child or husband and wife merely because that status in some way resembles the relationship of master and servant."

In Canada, to similar effect, is the case of *McArthur v. King* (1943), 3 Ex. C. R. 225. It is pointed out in petitioner's brief that the Canadian Parliament thereafter amended the statutes to provide that a member of the armed forces should be deemed a servant of the Crown. There is no such statute here nor any other statute authorizing, or attempting to authorize, recovery in a case like this.

It seems clear from all the foregoing cases that the relation between the government and its soldiers is merely that relation which exists between the state and its citizens. The soldier is merely performing one of his duties resting upon him as an obligation of citizenship. The induction of John Etzel into the armed services did not change his fundamental relationship to his government. His induction merely put into active effect the obligation then and theretofore existing upon him to bear arms as one of his duties of citizenship and made him for the period of his military service subject to military law and gave him certain rights and privileges.

The relationship which exists between the government and its citizens to bear arms would be as much interfered with by injury to a citizen subject to call to military service as by an injury to one already inducted. Carried to its logical conclusion, the theory upon which the plaintiff here attempts to predicate liability—that is, that a status exists between the government and its soldiers, would necessarily result in the government having a right to recover damages for loss of service of any citizen already registered under the selective Service Act, whether actually inducted or not. We maintain that the government does not have a propetry right in the

obligations of citizenship to bear arms, whether the citizen has or has not been inducted into the armed forces.

No federal status has been cited which gives to the plaintiff a right to bring the instant action or which creates in the plaintiff any cause of action because of the negligence of a tort feasor. If, therefore, a cause of action is to exist it must be discovered in the statutes of California or the decisions of the California courts. (*Erie v. Tompkins*, 304 U. S. 64.) See, also, *West v. American Telephone & Telegraph Co.*, 311 U. S. 223.

Before proceeding to discuss the California statutes and decisions, it may be noted that the only case of similar nature relied upon by the petitioner for support of its position is that of *Attorney General v. Valle-Jones*, 2 K. B. (1935), 209. It was much relied upon by plaintiff in the trial court and with less confidence now. There the Crown was permitted to recover wages paid to and hospital services paid for certain injured aircraftsmen, whose injuries were sustained in an accident caused by negligence of the defendant. That case, however, is of no assistance in attempting to determine what relation exists between a government and its soldiers. The question as to whether the relation of master and servant existed between the Crown and the airmen was neither argued nor decided. That question seems not to have been raised at all by counsel for the defendant. Upon that question the case, in effect, went by default. This is pointed out in the above cited case of *Commonwealth v. Quince*, and also by the opinion in the *United States v. Atlantic Coastline R. Co., supra.*

From the standpoint of logic and reason, if one examines critically the relation of a soldier to his government,

it becomes at once plain that while there are points of resemblance with the relation of a servant to his master, these points of resemblance are few and the points of dissimilarity are very many. Perhaps the main points of resemblance are that the soldier does perform certain services and he does receive certain pay therefor. The points of dissimilarity are, however, so numerous that it would scarcely be possible to name them all without overlooking some. While there is an agreement or a contract of a sort between the government and the soldier, it is not one concerning which the soldier has any choice. The agreement must be entered into by the soldier whether he desires it or not. Indeed, in the instant case the soldier John Etzel was a draftee—not a volunteer—and became a soldier merely because the law required him to report for induction. So far as appears, he might have profoundly desired to escape military service. In any event, he had no choice. The soldier has no part in fixing the terms of his enlistment nor of the services which he is to perform. He has no right to bargain as to wages or salary. He takes whatever the government gives him. He does not receive wages comparable to private employment. He cannot quit if he becomes dissatisfied. He must serve so long as the government desires to retain him. He cannot strike. He has nothing to say as to the kind of food he shall eat nor the sort of clothes he shall wear. He can be discharged at any time, even against his will and without the government's incurring any liability for damages. For injuries negligently inflicted by another soldier or through the furnishing to him of defective equipment, he has no cause of action against the government, although the government may, and usually does, make certain provisions for disability

payments or pensions in the event of injury. While he is not liable to a suit for damages at the hands of the government for failure properly to perform his duties, he may be punished, cast into jail, and if the offense be serious enough, his life may be forfeited. He is practically not a free agent at all. He does, eats, and wears whatever the government may say he shall do, eat, and wear and at such times, places, and under such circumstances as the government may choose. Nor do we think it has ever been supposed that the soldiers of the United States were entitled to any benefit under Workmen's Compensation Laws. Such are some of the differences in the relation of a soldier to his government as compared to the relation of a servant to his master. We make no claim that this list is all inclusive. Other important differences may and probably do exist.

For all of these reasons, we respectfully assert that the relation of master and servant did not exist as between the plaintiff and the soldier John Etzel and that unless the courts are to invent a new cause of action based not upon the master and servant relation, then the plaintiff has no cause of action for damages against the defendants and appellants.

We proceed now to an examination of the law in California and elsewhere respecting recovery by one person because of tortious injuries to another.

In California there are sundry statutes governing rights of recovery in such cases. The statute by which we respectfully assert this case must be judged is Civil Code,

Section 49, subdivision c. This section, so far as pertinent here, reads as follows:

> "The rights of personal relations forbid:
>
> "(c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction, or criminal conversation."

It may be noted in passing, and to this we shall advert again, that the injury referred to in the section is one "which affects his ability to serve." In other words, the action recognized by this section is an action arising from inability to serve.

Certain statutory provisions in California, in addition to Civil Code, Section 49, give a right of action by one for the injury or death of another. Thus, by section 376 of the Code of Civil Procedure, a right of action is given to a father for the injury or death of a minor child or to a guardian for the injury or death of a ward. Section 377 of the Code of Civil Procedure gives a right of action for death of an adult. Section 375 of the Code of Civil Procedure provides for an action by a parent for the seduction of a female child below the age of legal consent. California Workmen's Compensation Law gives an employer the right under certain circumstances to maintain an action against a third party tort feasor. Aside from the causes of action so provided, there do not appear to be any statutory provisions in California giving a right of action in one person for injuries sustained by another. Certain it is that there is no California Statute specifically granting a right of action to any-

one on account of injuries to a soldier. Therefore, under California Statutory Law, unless a soldier is a servant of the United States and unless the United States is his employer or master within the meaning of the terms "master and servant," there is no statutory provision in California for the maintenance of an action such as this.

It should be noted also that in California the rule of the Common Law that statutes in derogation thereof are to be strictly construed, has no application. The code establishes the law of California respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice. (Civ. Code, Sec. 4.) California Civil Code, Section 49, prior to the year 1939, was broader. Prior to that time, the Statutes of California gave rights of action for wrongs arising out of the interference with personal relations in the following instances: the abduction or enticement of a husband from his wife, the abduction or enticement of a wife from her husband, the abduction or enticement of a child from his parent or guardian, the seduction of a wife, daughter, orphan sister, or servant, and an injury to a servant which *affected his ability* to serve his master. (Civil Code, Sec. 49; Cal. Stats. 1905, p. 68.) In 1939, Section 49 of the California Civil Code was amended so as to take away the rights of action which had theretofore existed for the abduction or enticement of a husband from a wife, or of a wife from a husband, or the seduction of a wife, orphan sister, servant or a child over the age of legal consent. Section 49 of

the Civil Code, both before and after its amendment in 1939, was in derogation of the common law. Prior to 1939 it gave to the wife a cause of action for the enticement (alienation of affections) of her husband, which did not exist at common law, and after its amendment in 1939 it took away the right of action for the seduction of a daughter over the age of consent and the right of action for the seduction of a servant both of which existed at common law. The legislature of California thus made clear its intention that a right of action shall arise from the disturbance of personal relationships only in the instances set forth in the statute.

There is, therefore, no room in the California Statutes for a claim for recovery in this case based upon any other relation than that of master and servant.

Elsewhere, and at common law also, the rule was similar. In other words, unless the relation of master and servant existed, there could be no recovery by one person for injuries sustained by another.

Bartley v. Richtmyer, 4 N. Y. (Comstock) 38.

This was an action for damages for seduction of the plaintiff's stepdaughter. Common Law based the right of action for seduction of a daughter upon the theory that the relation of master and servant existed between the father and daughter. In this case it is said (p. 340):

> "When the daughter is of full age, the father is not entitled to her services; and he cannot maintain this action without showing that the relation of mas-

ter and servant actually existed at the time of the injury."

And, again:

"The gist of the action is loss of service."

A little later in the opinion, the court, in explaining the nature of the action, says:

"The courts went to the full length of their powers when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of actions."

The case of *Nickleson v. Stryker*, 10 Johnson (N. Y.) 115, was an action by a father for the debauching of his daughter, who was an adult. As above stated, such an action at common law was allowed only upon the fiction or theory that the daughter was the servant of her father. In this case, the court holds that whereas, if a daughter is a minor, the father's right to her services may be presumed, yet, where a daughter is of age, "she must be in the her father's service, so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her."

The reason for the rule is stated as follows in the case of *Woodward v. Washburn*, 2 Denio, 369, 374:

"The reason and foundation upon which this doctrine is built seem to be the property that every man has in the service of those whom he has employed, acquired by contract of hiring, and purchased by giving them wages."

Originally, it seems the Common Law gave the master no right of action against a third person for an injury inflicted upon his servant, causing loss of service, except where the servant was a menial one. In other words, the master was held to stand in *loco parentis*.

Burgess v. Carpenter, 2 So. Car. 7.

At Common Law the master had a cause of action for loss of services of a servant because he had a certain property right in the services and it was this property right which the common law sought to protect and which formed the basis of an action.

Tidd v. Skinner, 225 N. Y. 422, 122 N. E. 247.

Thus, it would appear that both under the Common Law and under California Statutory Law, unless the relation of master and servant existed as between the Government and the injured soldier, John Etzel, the plaintiff can have no cause of action for loss of services against a third person arising out of tortious injuries to the soldier.

In California, the right of action which a parent has for injuries to his minor child is not predicated upon Civil Code, Section 49, subdivision c, giving a right of action to a master for injuries affecting a servant's ability to serve but is based upon Section 376 of the California Code of Civil Procedure which gives the father the right to maintain an action for an injury to his minor child. At common law that right was predicated upon the fiction that

the infant was the servant of his father. It is true that in actions by a father for injuries to his minor child, the father, by reason of the parental relation and the inherent liability resulting therefrom to care for, maintain, and support the child, and by reason of the father's inherent right to receive the earnings of the child, is permitted to recover the pecuniary value of the child's services and also the cost of the child's medical and hospital treatment. A somewhat similar doctrine seems originally to have prevailed at common law with reference to apprentices and other menial servants who become a part of the master's family and to whom he stands in *loco parentis*. Such, however, is not the doctrine in California. Respecting a master and a servant, we suggest that it is the doctrine generally held in the United States, both under the California statutes and in other jurisdictions, that there are two rights of action: one by the servant and the other by the master, and that they are separate and distinct and do not overlap and that in the servant rests the right of action for all his personal injuries, including his lost earnings and the expense of his hospitalization, whereas in the master rests only such damages as he may have sustained by reason of the loss of the service of his servant.

It is the general rule that as to married women, infants, and servants, two actions lie at common law for personal injuries: one by the husband, father, or master for the loss of service and the other by the husband and wife, the infant, or the servant for the personal injury. (*Lang*

v. Morrison, 14 Ind. 599; *Bartley v. Richtmyer*, 4 N. Y. (Comstock) 38.)

From all the foregoing, we think it reasonably appears that the relationship of master and servant did not exist between the petitioner and its injured soldier and that, in the absence of such relationship, no cause of action exists either under California laws or in other jurisdictions for recovery for loss of services.

If the theory of petitioner is to be adopted and recovery is to be allowed to the plaintiff because a status exists between the government and its soldier which is in some respects similar to that of master and servant, this means that a new ground for a cause of action is allowed which has not heretofore existed. This is pointed out by the opinion of the Judge of the Supreme Court at Brisbane in the case of *Commonwealth v. Quince*, Queens Law Reporter of August 28, 1943, page 91 (which involved the identical situation at issue here) when he says:

> "I think it is not competent for a judge to invent a new liability arising out of some status which is not that of parent and child or husband and wife merely because that status in some way resembles the relationship of master and servant."

A decision in favor of the plaintiff in this case would have more far-reaching effect than merely to permit a recovery by the plaintiff. If the fact that a status exists which is somewhat similar to that of master and servant is to be of controlling effect, than what is to be said of

other varieties of relations which closely resemble the relationship of master and servant perhaps even more closely than that of the relationship of the government and its soldier—for instance, the status of principal and agent? Substantially the only difference between the relation of principal and agent and the relation of master and servant is the fact that the agent is somewhat more independent in his actions in the course of his employment than is the servant. Otherwise the analogy between the two is substantially identical. They both arise out of contracts of employment under which the principal in the one case and the master in the other employs the agent and servant respectively at a certain wage or salary. The agent in the one case and the servant in the other are subject to the direction of the principal or master in fulfilling the terms of the employment. In spite of this similarity in the two relations, it has never been supposed, so far as we are aware, that any valid claim can be made by a principal against a third person on account of injuries sustained by the agent which impaired or destroyed the agent's ability to fulfill his contract of employment with the principal. Yet, the doctrine argued for and which it is sought to establish as a law in this case would undoubtedly apply to the status of principal and agent.

Mention might also be made of the status of partners where there is a sort of mutual employment, each by the other. Each partner works for the other's benefit and each, in effect, pays the other for his services, but we do not think it has ever been asserted that one partner has a cause of action against a third person arising out of injuries to the other partner which destroyed or impaired his ability to work.

III.

Not Only Under California Law But Generally Throughout the United States, It Is the Rule That an Injured Person Has a Cause of Action Against the Tort Feasor for His Lost Wages and Hospital Expense. This Action Does Not Rest in the Master Even Though the Latter, by Reason of Contract or Otherwise, May Have Reimbursed His Servant for His Lost Wages and Hospital and Medical Expense. This Cause of Action of the Injured Soldier, John Etzel, Was Satisfied by the Payment Made to Him and Was by Him Released.

Quite apart from the question already discussed in this brief respecting the right or lack of right of the petitioner to recover at all against the third person who has negligently caused personal injuries to the soldier, is the question as to what recovery may be had, if a right of action exists; that is, what is the measure of damages so far as the master is concerned? To this question we now direct attention.

We have already pointed out that no evidence was offered to prove the value, if any, of the services of John Etzel, the soldier, to the petitioner. We have also pointed out that without evidence upon which to base the findings, the trial court found that the wages paid by petitioner to the injured soldier were the value of the services lost by petitioner during the injured soldier's disability. We have also adverted to the fact that the wages lost by an injured servant during his disability measures the injured person's loss of earnings rather than the value of the loss of service by the master. We shall refer to this again.

Under Section 49, subdivision c, of the California Civil Code, the right of action there contemplated on behalf of a master is one which accrues from an injury to a servant "which affects his ability to serve his master." In other words, the action is one in which the damages are to be measured by the value of the loss of the service. This right of action given to a master is, of course, quite different from the right of action which the injured employee has against the third person as a result of the tortious injury.

A claim for damages for personal injuries belongs exclusively to the person injured. (*Franklin v. Franklin*, 67 Cal. App. (2d) 717, 155 P. (2d) 637.)

Such claim by the injured person consists of his right to recover (a) for his injuries, including detriment to his health and physical capacity, and for physical suffering; (b) for loss of time, and in this respect his earning capacity is a proper element to be considered; and (c) for the reasonable expense of medical and hospital treatment and care. (*Campbell v. Los Angeles Traction Co.*, 137 Cal. 565, 568, 70 Pac. 624; *Hoffmann v. Lane*, 11 Cal. App. (2d) 655, 106 Pac. 113; *Dewhirst v. Leopold*, 194 Cal. 424, 433, 229 Pac. 30; *Graeber v. Perwin*, 43 Cal. 495.)

Many other cases could be cited but these are sufficient for illustration.

Such claim resting in the injured person is not subject to assignment by him, nor to transfer by agreement, nor by operation of law, as by subrogation. He, and he alone, can recover. (*Franklin v. Franklin*, 67 Cal. App. (2d) 717, 155 P. (2d) 637; *Cassetti v. Del Frate*, 116 Cal. App. 255, 257, 2 P. (2d) 533; *Adams v. White Bus Line*,

184 Cal. 710, 195 Pac. 389; *Jackson v. Deauville Holding Company*, 219 Cal. 498, 27 P. (2d) 643).

It would appear, therefore, that under California law the injured soldier, John Etzel, had a right of action for his personal injuries, the value of the wages which he would have earned and the reasonable value of any necessary hospital or medical expense. This cause of action he had settled and compromised, and in evidence of that settlement and compromise had given a full and complete release, which was introduced in evidence and marked "Defendants' Exhibit A" [Tr. pp. 34, 35].

The only case in California which research has disclosed and which bears upon Section 49c of the Civil Code is that of *Darmour Productions Corporation v. Baruch Productions*, 135 Cal. App. 351, 27 P. (2d) 664. There the master sought only to recover for loss of services. It is interesting to note that the very next case in the same volume of the Reports is *Ann Christy v. Baruch Productions*, 135 Cal. App. 355, 27 P. (2d) 660, which was an action by Ann Christy, the injured servant mentioned in the preceding case, against the tort feasor to recover her damages, and it is discovered upon examination of the Clerk's Transcript on Appeal that she sought to recover not only her general damages but also certain sums covering medical and hospital bills.

We do not intend to suggest that the injured man could successfully release a right of action resting in the United States. What we do suggest is that the right of action for lost earnings and for any hospital expenses rested in the injured soldier and not in the United States and has been by the injured soldier released and discharged. Therefore, to permit the recovery by the United States

in the instant action would, in effect, permit a double recovery for the same thing. If the United States should be held to have any cause of action at all in this case, it must be a cause of action measured by the actual worth of the services of its soldier to the United States. It is not a cause of action measured by what the injured soldier lost in compensation or measured by what his hospital bills were.

Let us consider the situation a little more critically for a moment. John Etzel is injured by the negligence of the defendants. Let it be assumed that he brings an action. Whatever claim he has is undoubtedly to be determined under California law. The tortious injury occurred in California and the claim arises under California statutes. His claim, as pointed out, under California law consisted of three elements: (a) a right to recover for his injuries and physical suffering; (b) for his loss of time, and in this respect, his earning capacity; and (c) for the reasonable expense of any medical and hospital treatment necessary for his proper care. All of these items of damage were a part of John Etzel's claim or cause of action. There can be no doubt of it, either under California law or generally elsewhere. Having this cause of action with these elements, Etzel has a right to compromise and release it. This he did. He had a right to do it. There is no statute preventing it. The defendants had a right to compromise and settle with Etzel. There is no statute preventing such action on their part. This being so, the right to recover was extinguished. Under petitioner's theory, however, what happens to John Etzel's right to claim an element of damage which the law gives him? Is it to be said: "Yes, Etzel had a right to recover lost earnings and medical expense as a part of his

claim for tortious injuries and therefore he had a right to release the entire claim, but the plaintiff also has a right to recover again for the same elements of hospital cost and Etzel's lost earnings?" Or, is it to be said: "Yes, Etzel would have had a right to recover his lost earnings and hospital expenses but they were not lost to him because the United States paid them and therefore the United States may recover?" Such, however, is not the law in California nor generally elsewhere throughout the United States.

In California, the Supreme Court of that state, in a very recent case, that of *Anheuser-Busch, Inc. v. Starley*, 28 A. C. 262, has definitely laid down the rule that where a person suffers personal injury by reason of another's tort, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. This decision was foreshadowed by numerous earlier California cases:

Loggie v. Interstate Transit Company, 108 Cal. App. 165, 169, 291 Pac. 618;

Reichle v. Hazie, 22 Cal. App. (2d) 543, 71 P. (2d) 849;

Purcell v. Goldberg, 34 Cal. App. (2d) 344, 93 P. (2d) 578;

Peri v. L. A. Junction Railway, 22 Cal. (2d) 111, 113, 130 P. (2d) 441;

Benich v. Market Street Railway Co., 29 Cal. App. (2d) 641, 85 P. (2d) 556;

Inglewood Park Mausoleum v. Ferguson, 9 Cal. App. (2d) 217, 49 P. (2d) 305.

This California rule is, we believe, the majority rule in the United States. It is the rule adopted in Volume 4 of Restatement of the Law of Torts, page 633, section 924, clause c, which reads as follows:

> "The damages are not reduced by the fact that the plaintiff has suffered no net financial loss as the result of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend (see §920, Comment e)."

Again, in the same volume, at page 620, section 920, subdivision e, the rule is thus stated:

> "In other cases the damages which he is entitled to recover are not diminished by the fact that either as a matter of a contract right or because of gifts, the transaction results in no loss to him. Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of insurance or from a contract of employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tort feasor's. Likewise, the damages for loss of earnings are not diminished by the fact that his employer or a third person makes gifts to him even though these have been given because of his incapacity. Further, he may be able to recover for the reasonable value of medical treatment or other services made necessary by the injury although these have been donated to him (see §924, Comment f)."

This rule thus stated in Restatement of the Law of Torts is supported by authorities from other states.

In the case of *Cunnien v. Superior Iron Works Company, et al.*, 175 Wis. 172, 188, 184 N. W. 767, the Supreme Court of Wisconsin states the rule as follows:

> "It also seems to be the prevailing doctrine in this country that, where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury."

There is a note to this case in 18 A. L. R. 678 citing numerous cases to the same effect. The case is, further, very pertinent here because it involved the right of a member of the Naval Forces of the United States to recover for lost wages notwithstanding payment of wages and compensation to him by the Navy. The injured plaintiff was hurt in an automobile accident due to the negligence of the defendant. He was paid by the United States certain sums under the terms of Government Statutes during his period of disability. The jury found that his lost earnings amounted to $1500. The trial court, in its judgment, deducted this $1500 from the total of the damages as fixed by the jury on the theory that the government had already paid the injured plaintiff for his lost earnings. The Supreme Court held that this was improper and that judgment should have been rendered for the full amount by the jury. The holding of the court is succinctly stated in the syllabus, as follows:

> "The amount awarded one enlisted in the United States Navy for loss of time because of injury negligently inflicted upon him by a third person should not be deducted from the total amount awarded him as damages for the injury, although he continued for

a time to draw his pay from the government and received an allowance for vocational rehabilitation under the Federal Statutes."

In the case of *Shea v. Rettie*, 287 Mass. 454, 192 N. E. 44, 95 A. L. R. 571, there was involved the right of a police officer to recover from a tort feasor who had injured him damages for his impaired earning capacity, even though such police officer had been paid his wages by his employer, the City of Worcester. It was held that the mere fact that the injured police officer had continued to receive his wages was no ground for diminution of the damages which should be paid by the tort feasor and the court says (p. 458):

"The plaintiffs, who under a contract were entitled to disability payments from the city ought not in reason to be held to be in any other position than if the payments came from an insurance company under a policy providing accident or disability insurance. Heath v. Seattle Taxicab Co., 73 Wash. 177, 131 P. 843. There is no joint relationship between the city whose obligation to the plaintiffs arises under a contract of employment providing for payments to a police officer absent from duty because of sickness or injury due to any cause and the defendant whose obligation originates in his wrongful conduct. The duty imposed by law upon him is to compensate the plaintiffs for all the damage done by his negligence including impairment of earning capacity. That obligation is not fulfilled because it happens that the plaintiffs have a contract with the city which entitles them to be indemnified by disability payments during absence from duty. Compensation for the defendant's wrong is not thereby furnished by the defendant. Such payments by the city do not concern and

should not benefit the defendant. They have no bearing on his liability or upon the extent of the plaintiffs' injury nor do they afford a measure of the plaintiffs' working capacity during their disability. The fact that such payments were made, and their amount, were rightly disregarded by the judge in estimating the plaintiffs' damages. That was in accord with the weight of authority in this country."

The case of *Gutzweiler v. Milwaukee Electric Railway & Light Company*, 136 Wis. 34, 116 N. W. 633, holds that the amount received by an injured person under an accident policy for which he has paid premiums cannot be considered by way of partial or total satisfaction of damages claimed by such injured person from the tort feasor.

To similar effect is the case of *Harding v. Town of Townshedn*, 43 Vt. 536. In this case, in answer to the contention of the tort feasor that the injured plaintiff was entitled to but one satisfaction for the injury he had sustained, the court in substance holds that to permit the tort feasor to take advantage of the insurance of the injured person would be a "privation of justice." It was held that the tort feasor was not entitled to have the proceeds of an accident insurance policy of the plaintiff deducted from the amount of damages.

To similar effect is the case of *Wells v. Minnesota Baseball and Athletic Association*, 122 Minn. 327, 142 N. W. 706, wherein it is held that a plaintiff may recover the reasonable value of nursing service rendered to her by her mother even gratuitously and without promise to pay.

If it be claimed by the plaintiff that it acquires some right by operation of law or by subrogation, then the answer is that such rights cannot be acquired in Califor-

nia and usually not elsewhere. See *Franklin v. Franklin*, 67 Cal. App. (2d) 717, 155 P. (2d) 637, and other cases heretofore cited earlier in this section of this brief.

Nor can an action for damages for personal injuries be settled and recovered partly at one time and partly at another. (*Kidd v. Hillman*, 14 Cal. App. (2d) 507, 58 P. (2d) 662.) This case, in some respects, is not unlike the case at bar. The plaintiff brought an action for damages to person and property resulting from an automobile accident caused by the defendant's negligence. In this action, she obtained a judgment and executed a release to the defendant of all liability. Subsequently, another action was brought for damages to her automobile upon the theory that the insurance company, having indemnified her for the damage to her machine, had become subrogated to her right of action and therefore should be permitted to recover for the damage to the automobile. It was held that the release signed by the plaintiff was binding on the insurance company; that the cause of action for damages arising out of the action could not be split, and that in this respect the insurer was in no better position than the insured. The action was barred both by the release and by the rule forbidding the splitting of the cause of action.

See, also, to similar effect:

Grain v. Aldrich, 38 Cal. 514, 519;

Van Horne v. Treadwell, 164 Cal. 620, 622; 130 Pac. 5;

Herritch v. Porter, 23 Cal. 385.

Not only is it the law of California that there is no right of recovery in an employer for such items of lost

wages and hospital expenses as those for which the plaintiff sues in the case at bar, but there are sundry decisions elsewhere to the same effect.

Interstate Telephone & Telegraph Co. v. Public Service Electric Co., 86 N. J. Law, 26, 90 Atl. 1068.

This case discusses generally the question as to whether an employer has any right to recover wages and medical bills paid to or for an employee. The Court says:

> "The legal right of an employer to recover damages for the loss of service of employees due to tortious act of a third person has never included the wages paid his servants for past work or the wages he might pay for future work. What the employer loses is the value of the services to him; what the present plaintiff seeks to recover is the value of the services to the employee. The employer loses what he might have made over and above the cost of the employee's services; he does not in any proper sense lose the necessary expense of securing that labor."

So, also, in the case at bar the item of wages which the plaintiff seeks to recover is the "value of the services to the employee," if he be presumed to be an employee for the sake of the argument.

City of Philadelphia v. Philadelphia Rapid Transit Company, 337 Pa. St. 1, 10 A. (2d) 434. In this case it appeared that certain firemen, employees of the plaintiff, had been injured by the negligence of the defendant. The firemen brought a separate suit against the defendant and recovered judgments aggregating $25,000. In these suits they made claim for loss of wages and the cost of medical care but offered no evidence thereof. The city, under

compulsion of Pennsylvania statutes, continued to pay full wages to the firemen during their disability and also all medical and hospital bills occasioned by the injuries, the total sum aggregating in excess of $6,000. The city then brought this suit to recover from the defendant the amount of such payments. It was held that the city could not recover. The court adverts to the rule which we have shown prevails in California to the effect that the right to recover lost wages and medical bills rests in the injured employees and might have been enforced in the employees' actions, and that the law does not admit of a splitting of a cause of action between the employees and the employer. The court says that the mere fact that the city had paid wages and medical and hospital bills to and for the injured employees was no bar to the recovery of these items by the injured men in their suits against the defendant, and then says:

> "Appellant contends that the relation between the city and the firemen was that of master and servant and at common law a master has a right of action for loss of services of his servant caused by the negligence of a third party and that the city's suit can be sustained on that theory. It is extremely doubtful whether such a right of action should be recognized under modern conditions. Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co., 280 Mass. 282; 182 N. E. 477. In any event, no attempt was made to establish the extent of the city's loss by reason of the incapacity of the firemen. Apparently the only loss sustained was the compensation and expenses paid. As pointed out, the right to recover these items is in the firemen themselves and the city's right is based on subrogation, which cannot be asserted in a separate suit."

Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co., 280 Mass. 282, 182 N. E. 477. In this case, referred to in the last cited case, it appeared that an employee of plaintiff was injured by the negligence of the defendant, resulting in such employee's disability and impairment of earning capacity, and that by contract the plaintiff was obligated to pay, and had in fact paid, to the injured employee, named Hoffman, his regular salary during such disability. In a former action Hoffman, the injured employee, had recovered from the defendant damages for his injuries, in which no claim was made and no recovery had for impairment of earning capacity or loss of wages. The plaintiff then brought this action against the defendant, claiming the right to recover the wages it had paid to the injured employee during his disability. It was held that the declaration stated no cause of action. The court draws a distinction between an action in tort founded on a relation springing from a contract and an action for tortious injury to a child brought by a parent whose loss is the effect of a relation which is both natural and legal and hence not too remote. The court also adverts to the rule which we have heretofore mentioned in this brief to the effect that the relation of master and apprentice was such as would sustain an action similar to that of a parent for injury to his child, and says (p. 285):

> "The status of apprentice included frequently, if not always, the equivalent of membership in the family of the master. In aspects of nurture and training and education either in a trade or in the schools the relationship bears resemblance to that of parent and child. The right of action in the *Imes* case is strongly akin to that long recognized by the law by the

parent for consequential damages from injury to his minor child, including loss of service during the nonage."

The court then states that the rule has been laid down in numerous cases that the plaintiff in an action for personal injuries founded on the negligence of a defendant is entitled to have taken into account as an element of damages the impairment of his capacity for labor and that loss of time and diminuation of earning power accrued and likely to accrue may be considered in estimating damages and that the injury of which the plaintiff complains (that is the loss of wages), is a part of the injury which Hoffman, the injured employee, sustained. It then points out that it is the general rule that all damages resulting from a specified cause of action must be assessed in one proceeding and that a single cause of action cannot be split and made the basis of several proceedings. The court says (p. 286):

"The weight of authority in other jurisdictions supports the conclusions and implications of our own decisions. * * * Some cases of action by a master to recover damages founded on contract with his servant injured by the tort of the defendant have a contrary tendency. Those cases chiefly arose many years ago when the law of master and servant was comparatively undeveloped."

The court then concludes (p. 287):

"We are unable to perceive any sound distinction in principle between liability of a tort feasor to another when the injured person was under contract with that other to perform personal service and when under contract to do or not to do some other act, all unknown to the doer of the wrong. In the latter

instances plainly there is no liability because the damage is too remote and indirect. It is not the natural and probable consequence of the ordinary tort. We think by the same reasoning that in the former instance there cannot rightly be held to be liability."

It was held in *Northern States Contracting Company v. Oakes,* 191 Minn. 88, 253 N. W. 371, that a contractor could not recover from a subcontractor for increased workmen's compensation insurance premiums which the contractor was compelled to pay in consequence of an employee's death caused by the subcontractor's negligence, as this was a too remote and indirect result of a wrongful act.

Closely akin to the foregoing cases and involving the same rule of law as is indicated in the quotation appearing above from the case of *Chelsea Moving & Trucking Co., Inc. v. Ross Towboat Co.,* 280 Mass. 282, 182 N. E. 477, is the general rule that a tort to one person does not make the tort feasor liable to another person merely because the injured person was under a contract with that other. In the instant case, therefore, if it should be thought that there was any contractual relation between the injured soldier and the government under which the latter was obliged to pay the injured soldier his compensation and medical expense, this fact would not give the plaintiff any cause of action against the defendant who had negligently injured the soldier. To this point we cite several cases of which the first is *Robins Dry Dock & Repair Co. v. Flint,* 275 U. S. 303, 72 L. Ed. 290.

In this case it seems that the respondents were charterers of a certain steamship. Under the terms of the charter, the ship was to be docked each six months and pay-

ment of the hire was to be suspended until it was again in proper state for service. In accordance with these terms, the ship was delivered to the petitioner for repairs, and by reason of the petitioner's negligence, the propeller of the ship was so injured that a delay was caused for which the suit was brought. It was held that the charterers could have no cause of action against the petitioner, the Supreme Court saying:

> "Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action Angle v. Chicago St. P. M. & O. R. Co., 151 U. S. 1, 38 L. Ed. 55, 14 S. Ct. Rep. 240, no authority need be cited to show that as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See National Sav. Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621. The law does not spread its protection so far."

The case of *The Federal No. 2*, 21 F. (2d) 313 (C. C. A. 2d), involved an attempt by one who was under contractual obligations to pay the hospital expenses of an injured employee to recover the amount of the expenses from a tort feasor who had injured an employee. The Circuit Court of Appeals says:

> "The appellant's claim, as alleged, is based upon the theory that the tug was a proximate cause in a chain of causation resulting in the damage. The seaman was cared for in the United States Marine Hospital, and because he was under contractual relations with the appellant as a seaman it was obliged to pay the bill. The basis of the claim is that the negligence resulting in injury to Parr gave rise to the occasion which required or obliged the appellant to pay the hospital bill. Even though one causes injury to another, to impose responsibility therefor contemplates a violation of a legal duty. The tug owed no legal duty to the appellant with reference to its contractual rights with the seaman. No principle of subrogation of rights is involved. The seaman had a cause of action against the tug for negligence. If he had succeeded in it or settled or made adjustment thereof, that would end all of appellant's claims resulting from injury to this seaman. In the absence of some right of subrogation, either by contract or foreign law, the appellant may not succeed. In the absence of some contractual rights, such as exist in the case of accident insurers to recover losses paid an assured, which the assured can recover from the tort-feasor and the insurer (Suttles v. Ry. Mail Assn., 156 App. Div. 435, 141 N. Y. S. 1024), we perceive no right of action accorded to the appellant.
>
> * * * When the seaman was injured, the contingency contemplated in is contract of employ-

ment occurred and he was entitled as promised by implication of law, to his employer's aid in effecting his cure; that is, the payment of the hospital bill and maintenance. It is too indirect to insist that this may be recovered, where there is neither the natural right nor legal relationship between the appellant and the tug, even though the alleged right of action be based upon negligence.

"* * * The cause of the responsibility is the contract; the tort is the remote occasion."

In *The Toluma*, 72 F. (2d) at page 693, the rule is thus stated:

"It may be accepted generally that a tort to one person does not extend in legal consequence to a third person who has been harmed merely because he had contracted with the one directly injured in person or properrty by the tort."

Similarly, in *Brink v. Wabash Railroad Company*, 160 Mo. 87, 60 S. W. 1058, it was held, as epitomized in the syllabus:

"The injury to a parent by the negligent killing of his son who is under contract to support him, thereby preventing performance of the contract, is too remote to form a basis for recovery on behalf of the parent in absence of wilful intent to injure the parent."

In the case of *Connecticut Mutual Life Insurance Company v. New York & New Haven Railroad Co.*, 25 Conn. 265, the Supreme Court of Connecticut has recognized the same rule thus succinctly stated in the syllabus:

"Where one person has contract relations with another, an injury to the latter which affects disastrous-

ly those relations, does not constitute a legal injury to the former."

The case of *Byrd v. English*, 117 Ga. 191, 43 S. E. 419, cites the *Connecticut* case above mentioned and reaches the same conclusion. We quote from the syllabus:

> "A party to a contract who is injured by reason of the failure of the other party to comply with its terms cannot recover damages for the negligent act of a third person by which the performance of the contract was rendered impossible."

Thus, it appears, both under California law and elsewhere that no right of action is afforded to a master to recover the wages lost by a servant and the hospital and medical expenses necessary for the treatment of the servant, even though those items may have been paid by the Master; furthermore, that the right of action for those items rests in the injured servant and does not rest in the master; and that the right of action which a master has for loss of service is not at all to be measured by the wages which have been lost by the employee. Such lost wages are the measure of one of the items of damage suffered by the injured person and are not a measure of the damage sustained by the master.

Upon page 73 of the Petitioner's brief are cited certain cases claimed to support the doctrine that where a master is under a duty to maintain the servant, expenditures for hospital and medical care required by the defendant's tort are considered a proper element of the master's damages. The cases are not authority for this statement. We proceed to examine them.

The first case of *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. 417 involved the right of a parent to recover for injuries to his child. As we have pointed out, the right of a parent is different from that of a master and in California is governed by a separate statute. The case, however, is of considerable interest for a distinction is drawn between the recovery allowed to a master for injury to his servant and the recovery allowed to a parent for injury to his child. After adverting to the fact that by some authorities the loss of service is the foundation of an action by a parent and noting that English courts, influenced by this strict view of the gravamen of the action, have decided that a father has no remedy, even for his expenses, where a child is of such tender years as to be incapable of rendering any services, then draws a distinction between actions by a parent and actions by a master, saying:

> "The authorities in this country have approved a more liberal and more reasonable doctrine, and, basing the right of action upon parental relation, instead of that of master and servant, allow the father to recover consequential loss, irrespective of the age of the minor."

The next case of *Jones v. Waterman S. S. Corporation*, 155 F. (2d) 992, involved the relation of a shipowner and its seamen. The holding of the court seems to have been largely influenced by three things: first, the action arose in Pennsylvania and the opinion states that no Pennsylvania cases could be found upon the direct question—that is, the right of a master to recover from a third person the expenditures the master had made as a result of tortious injuries to the employee; second, that the ship-seaman relationship is different from that of master and

servant; and third, much influence seems to have been exerted by the opinion of the District Court in the case at bar. In this third aspect, the opinion, therefore, rests in part upon a decision which has been since reversed by the Circuit Court of Appeals and the doctrines of which are now under consideration in the instant case. Respecting the statement of the opinion that no Pennsylvania cases could be found upon the question, we refer to the rather recent Pennsylvania case of *City of Philadelphia v. Philadelphia Rapid Transit Company*, 337 Pa. St. 1, 10 A. (2d) 434, to which we have already adverted in this brief. There the Pennsylvania Supreme Court follows the rule which we have already shown prevails in California to the effect that the right to recover lost wages and medical bills rests in the injured employee and that the mere fact that the plaintiff city of Philadelphia had paid wages and hospital and medical bills under compulsion of the Pennsylvania statutes was no bar to the recovery of these items by the injured men in their suits against the defendant. The City had no cause of action for these sums thus expended. Apparently, the opinion of the Circuit Court of Appeals in the case of *Jones v. Waterman* would have been different if this Pennsylvania case had been before the court. In any event, in the *Jones* case there is a strong dissenting opinion suggesting that any recovery ought first to be preceded by passage of legislation by the Pennsylvania Legislature.

The next cases cited—that is, *Sawyer v. Sauer*, 10 Kan. 519, and *Franklin v. Butcher*, 144 Mo. Appeals, 660, are both parent and child cases and not cases involving the relationship of master and servant. The case of *Coon v. Moffitt*, 2 Pen. (N. J.) 583, also found in 3 N. J. Law 169, was an action by a mother for damages for the de-

bauching of her daugther and also falls among the cases allowing a parent to recover for medical expense incurred in treating a child. It is to be noted that this last mentioned action was decided in 1809. The more modern doctrine in New Jersey as respects suits by a master is laid down in *Interstate Telephone & Telegraph Company v. Public Service Electric Company*, 86 N. J. Law 26, 90 Atl. 1068. There the court says that the legal right of an employer to recover damages for the loss of services of employees due to the tortious act of a third person has never included the wages paid his servant for past work or the wages he might pay for future work. It points out that what the employer loses is what he might have made over and above the cost of the employee's services and he does not, in any proper sense, lose the necessary expense of securing that service.

The next succeeding case is *Callaghan v. Lake Hopatcong Ice Company*, 69 N. J. Law 100. That case also involves the parent and child relation and we have already pointed out that as to master and servant the rule as to recovery in New Jersey is different. (*Interstate Telephone & Telegraph Company v. Public Service Electric Company*, 86 N. J. Law 26, 90 Atl. 1068.)

Also cited is *Hodsoll v. Stallebrass*, 11 A. & E. 301, also found in 113 English Reports 492. This case was decided in 1840. It was an action by a master for damages claimed to have resulted from a servant having been bitten by defendant's dog. While it appears in the brief report of this case that the declaration contained some

language that the plaintiff had expended money in attempting to cure his servant, it does not appear that there was any evidence introduced of such expenditures nor any allowance therefor. The jury had allowed 10£ damages covering the time up to the filing of the declaration and 20£ damages covering the time thereafter. The sole and only point decided in the case was that the plaintiff could recover the 20£ allowed by the jury for damages for loss of services subsequent to the filing of the declaration.

Martinez v. Gerber, 3 M. & G. 89, also found at 113 English Common Pleas Reports 1069, was a case in which the plaintiff-master sued for loss of services of his injured servant and the expense of procuring another to do the injured servant's work. No claim of wages paid to the injured servant or of medical expense paid for him was involved.

The last case cited by petitioner on this point is *Attorney General v. Valle-Jones*, 2 K. B. 209, to which we have already adverted, showing not only that it stands alone but that the relationship of the soldier to the Crown was not at issue, the case having in effect gone by default on that question.

Petitioner argues, in effect, that the doctrine of the parent and child cases permitting recovery by the parent of the expenses of caring for the child who has been injured should be extended to the present case. This would be contrary to the law as it has long existed. Thus, in *Reeve on Domestic Relations* (4th Ed., 1888), 486, the learned author was considering the right of a

master to recover where his servant had been injured, and after indicating that there is a right of recovery of expenses of treatment in the case of slaves, apprentices, and children, says:

> "But in case of a hired servant, the servant must ultimately be at all the expense himself; and such expense will be a part of the damages which belong to him. If the beating be such as occasion no loss of services, the master is not entitled to recover anything."

Petitioner's argument also goes counter to the general trend of the authorities. Thus, in *Bartley v. Richtmyer*, 4 N. Y. (Comstock) 38, we have already pointed out that the opinion states that the courts went to the full length of their power when they held that the relation of parent and child might be regarded as that of master and servant for the purpose of supporting this class of action.

Petitioner's argument is also counter to the trend of the more modern authorities.

Interstate Telephone & Telegraph Company v. Public Service Electric Company, 86 N. J. Law 26, 90 Atl. 1068;

City of Philadelphia v. Philadelphia Rapid Transit Company, 337 Pa. State 1, 10 A. (2d) 434;

City of Youngstown v. City Service Oil Co., 66 Ohio Appeals 97, 31 N. E. (2d) 876;

Wood v. Ford Garage Company, 162 Misc. 87, 293 N. Y. S. 999, 1003; Affirmed 252 App. Div. 921, 300 N. Y. S. 1358.

Conclusion.

We earnestly contend in this case that the law applicable and by which it should be judged is the law of California. This contention, we think, is warranted by the federal statute which provides that

> "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."
>
> 1 Stat. at Large, 73, 92; Chap. 20;
> 28 U. S. C. A., Section 725.

This statute was authoritatively applied in accordance with its terms in *Erie v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. See, also, *West v. American Telephone & Telegraph Company*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139.

If, however, the court should disagree with us, then we point out that there is no federal general common law.

> *Erie v. Tompkins*, 304 U. S. 64;
>
> *Kansas v. Colorado*, 205 U. S. 46;
>
> *Western Union Telegraph Company v. Call Publishing Company*, 181 U. S. 92.

If, therefore, in the absence of reliance upon California law the rule to be adopted in this case is to be "fashioned from the materials at hand," then those materials are

ready in the decisions of the courts of last resort of the states and in the decisions of the federal courts which we have cited, which are almost unanimous in compelling the conclusion that there is no right of recovery in a case such as this unless the relation of master and servant exists and that, even if there were a right of recovery for loss of service, yet no such right exists for the recovery of the items of lost wages of the injured man and medical expense and hospitalization, which items constitute elements of the injured person's measure of damages and not elements of the master's right of recovery.

Where else should we search to find the guiding principle other than in the decisions of the courts? Pertinent to this thought is the language of this court in *Kansas v. Colorado*, 205 U. S. 46, 96, when, after quoting Kent's Declaration that "The common law includes those principles, useages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature," proceeds as follows:

> "As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial trib-

unals in their efforts to ascertain what is right and just between individuals in respect to private disputes."

We suggest that it would not be "right and just" if one rule of law be applied to the injured man in this case permitting him to recover for his lost wages and necessary hospital expenses, whether paid by him or not (and such is the law of California, as we have shown) and another rule of law to apply to the plaintiff under which it would also have a right of recovery for the same items.

In conclusion, therefore, we urge that it has been shown that the relation of master and servant does not exist between the plaintiff and its injured soldier, that in the absence of such relation, no right of action would arise for recovery of loss of services and that at all events no cause of action exists in the plaintiff either under California law or generally elsewhere for the recovery of the items sued for in this case.

We respectfully urge that the decision of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted,

JENNINGS & BELCHER,

By FRANK B. BELCHER,

Attorneys for Standard Oil Company of California and Ira Boone.

SUPREME COURT OF THE UNITED STATES

No. 235.—October Term, 1946.

The United States of America, Petitioner, *v.* Standard Oil Company of California and Ira Boone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 23, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

Not often, since the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is this Court asked to create a new substantive legal liability without legislative aid and as at the common law. This case of first impression here seeks such a result. It arises from the following circumstances.

Early one morning in February, 1944, John Etzel, a soldier, was hit and injured by a truck of the Standard Oil Company of California at a street intersection in Los Angeles. The vehicle was driven by Boone, an employee of the company. At the Government's expense of $123.45 Etzel was hospitalized, and his soldier's pay of $69.31 was continued during his disability. Upon the payment of $300 Etzel released the company and Boone "from any and all claims which I now have or may hereafter have on account of or arising out of" the accident.[1]

From these facts the novel question springs whether the Government is entitled to recover from the respondents as tort-feasors the amounts expended for hospitalization and soldier's pay, as for loss of Etzel's services. A jury being waived, the District Court made findings of

[1] The instrument of release recited that the payment "is not, and is not to be construed as" an admission of liability.

fact and conclusions of law in the Government's favor upon all the issues, including those of negligence and contributory negligence. Judgment was rendered accordingly.[1] 60 F. Supp. 807. This the Circuit Court of Appeals reversed, 153 F. 2d 958, and we granted certiorari because of the novelty and importance of the principal question.[2] 329 U. S. 696.

As the case reaches us, a number of issues contested in the District Court and the Circuit Court of Appeals have been eliminated.[3] Remaining is the basic question of respondents' liability for interference with the government-soldier relation and consequent loss to the United States,

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[1] The Government's petition for certiorari asserted that "upwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, and the payment of compensation during incapacitation, have been reported by the War Department to the Department of Justice in the past three years," and that additional instances were being reported to the War Department at the rate of approximately 40 a month.

The suit also was said to be representative of a number already commenced, *e. g.*, *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E. D. N. C.), dismissed on the ground that no master-servant relationship existed, and *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover hospital and medical expenses incurred as a result of an injury to a Civilian Conservation Corps employee, dismissed for the reason that the United States Employees' Compensation Act, 5 U. S. C. § 751 *et seq.*, was held to afford the Government a method of recoupment, concededly not available here.

[2] Including the issues of negligence and contributory negligence, as to which a stipulation of record on the appeal to the Circuit Court of Appeals states that evidence other than that set forth in the stipulation is omitted "for the reason that appellants are not making any point on appeal as to the insufficiency of the evidence either to prove negligence or the absence of contributory negligence."

Although the District Court refused to find that Etzel as a soldier was "as such, a servant of the plaintiff," respondents designated as the points on appeal on which they intended to rely: That the United States had no cause of action or right to recover for the compensation

together with questions whether this issue is to be determined by federal or state law[4] and concerning the effect of the release.[5] In the view we take of the case it is not necessary to consider the questions relating to the

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paid Etzel or for the medical and hospital expenditures; that he "was not an employee of the plaintiff nor was plaintiff his master nor did the relation of employer or employee exist between them"; and that his release was effective to end "all right to recover for lost wages or medical or hospital expenses."

[4] The Circuit Court of Appeals, considering that at the outset it was "confronted with the problem of what law should apply," said: "Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the state rules of substantive common law would govern an action brought by the United States in the role of private litigant. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 71, 78; *United States* v. *Moscow-Idaho Seed Co.*, *supra* [92 F. 2d 170], at pages 173, 174." 153 F. 2d at 960. The court then indicated agreement with appellant that California's statutory law, namely, § 49 of the Civil Code, was controlling and concluded that the Government's case "must fail for two reasons: first, because the government-soldier relation is not within § 49 of the Code, and, second, because the government is not a 'master' and the soldier is not a 'servant' within the meaning of the Code section." 153 F. 2d at 961.

The court further concluded, however, that Etzel's release "covered his lost wages and medical expenses as elements of damage," and therefore was effective to discharge all liability, including any right of subrogation in the United States "without statutory authority." Finally the opinion stated: ". . . it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages." *Id.* at 963.

[5] See note 3. The Government's claim, of course, is not one for subrogation. It is rather for an independent liability owing directly to itself as for deprivation of the soldier's services and "indemnity" for losses caused in discharging its duty to care for him consequent upon the injuries inflicted by appellants. See *Robert Mary's Case*, 9 Co. at 113a. It is, in effect, for tortious interference by a third person with the relation between the Government and the soldier and consequent harm to the Government's interest, rights and obligations in that relation, not simply to subrogation to the soldier's rights against the tort-feasors.

release,[6] for we have reached the conclusion that respondents are not liable for the injuries inflicted upon the Government.

We agree with the Government's view that the creation or negation of such a liability is not a matter to be determined by state law. The case in this aspect is governed by the rule of *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, and *National Metropolitan Bank* v. *United States*, 323 U. S. 454, rather than that of *Erie R. Co.* v. *Tompkins*, *supra*. In the *Clearfield* case, involving liabilities arising out of a forged indorsement of a check issued by the United States, the Court said: "The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Board of Commissioners* v. *United States*, 308 U. S. 343; *Royalty Indemnity Co.* v. *United States*, 313 U. S. 289. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick* v. *Greaney*, 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447. In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U. S. at 366–367.

Although the *Clearfield* case applied these principles to a situation involving contractual relations of the Government, they are equally applicable in the facts of this case where the relations affected are noncontractual or tortious in character.

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[6] We may assume that the release was not effective to discharge any liability owing independently to the Government, cf. note 5, although fully effective as against any claim by the soldier. Only if such an independent liability were found to exist would any issue concerning the release be reached.

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. See *Tarble's Case*, 13 Wall. 397; *Kurtz* v. *Moffitt*, 115 U. S. 487. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers,[7] equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.[8]

Since also the Government's purse is affected, as well as its power to protect the relationship, its fiscal powers, to the extent that they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion. Indeed, in this aspect the case is not greatly different from the *Clearfield* case or from one involving the Government's paramount power of control over its own property, both to prevent its un-

[7] Including the powers of Congress to "provide for the common Defense," "raise and support Armies," and "make Rules for the Government and Regulation of the land and naval Forces," U. S. Const., Art. I, § 8, as well as "To declare War" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers. . . ." *Ibid.*

[8] The decision of the Circuit Court of Appeals seems to have been predicated upon the assumption that Congress could override any contrary rule of state law and that the California law governs only in the absence of Congress' affirmative action. See note 4 *supra*.

authorized use or destruction and to secure indemnity for those injuries.[9]

As in the *Clearfield* case, moreover, quite apart from any positive action by Congress, the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the *Erie* decision. The great object of the *Erie* case was to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits. It was the so-called "federal common law" utilized as a substitute for state power, to create and enforce legal relationships in the area set apart in our scheme for state rather than for federal control, that the *Erie* decision threw out. Its object and effect were thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control.

Conversely there was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature. The diversity jurisdiction had not created special problems of that sort. Accordingly the *Erie* decision, which related only to the law to be applied in exercise of that jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government

[9] See U. S. Const., Art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."; *Camfield* v. *United States*, 167 U. S. 518, 524: ". . . the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers."; *United States* v. *Walter*, 263 U. S. 15, 17: "The United States can protect its property by criminal laws. . . ."

as to require uniform national disposition rather than diversified state rulings. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. at 366–368. Hence, although federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.

In this sense therefore there remains what may be termed, for want of a better label, an area of "federal common law" or perhaps more accurately "law of independent federal judicial decision," outside the constitutional realm, untouched by the *Erie* decision. As the Government points out, this has been demonstrated broadly not only by the *Clearfield* and *National Metropolitan Bank* cases, but also by other decisions rendered here since the *Erie* case went down,[10] whether or not the Government is also correct in saying the fact was foreshadowed the same day by *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110, in a unanimous opinion delivered likewise by Mr. Justice Brandeis.[11]

It is true, of course, that in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has

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[10] *Board of Commissioners* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *D'Oench Duhme & Co.* v. *Federal Deposit Ins Corp.*, 315 U. S. 447; *United States* v. *Allegheny County*, 322 U. S. 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392. See also discussion in Notes, *Federal Common Law in Government Action for Tort* (1946) 41 Ill. L. Rev. 551; *Exceptions to Erie* v. *Tompkins: The Survival of Federal Common Law* (1946) 59 Harv. L. Rev. 966.

[11] If the ruling followed, that the waters of an interstate stream must be equitably apportioned among the states through which it flows in the arid regions of the West, is not properly to be character-

not acted specifically. "In our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust Co.* v. *United States*, 318 U. S. at 367. The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim. Cf. *United States* v. *Fox*, 94 U. S. 315.[12] In other situations it may fairly be taken that Congress has consented to application of state law, when acting partially in relation to federal interests and functions through failure to make other provision concerning matters ordinarily so governed.[13] And in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest.

But we do not undertake to delimit or categorize the instances where it is properly to be applied outside the *Erie* aegis. It is enough for present purposes to point out that they exist, cover a variety of situations, and generally involve matters in which application of local law not only affords a convenient and fair mode of disposition, but also is either inescapable, as in the illustration given above, or does not result in substantially diversified treatment where uniformity is indicated as more appropriate, in view of the nature of the subject matter and the specific issues affecting the Government's interest.

Whether or not, therefore, state law is to control in such a case as this is not at all a matter to be decided by

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ized as merely one of "federal common law," it marks off at any rate another area for federal judicial decision not dependent on application of state law or, indeed, upon the existence of federal legislation.

[12] The problem of the Government's immunity to suit is different, of course, from that of the nature of the substantive rights it may acquire, for example, by the purchase of property as against claims of others for which there may or may not be available a legal remedy against it.

[13] See *Blair* v. *Commissioner*, 300 U. S. 5; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204.

application of the *Erie* rule. For, except where the Government has simply substituted itself for others as successor to rights governed by state law, the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law. These include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity and, in some instances, inferences properly to be drawn from the fact that Congress, though cognizant of the particular problem, has taken no action to change long-settled ways of handling it.

Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines.

Furthermore, the liability sought is not essential or even relevant to protection of the state's citizens against tortious harms, nor indeed for the soldier's personal indemnity or security, except in the remotest sense,[14] since his

[14] That is, if potential added liability ever can be considered as having effect to deter the commission of negligent torts, the imposition of liability to indemnify the Government in addition to indemnifying the soldier conceivably could be thought to furnish some additional incentive for avoiding such harms.

personal rights against the wrongdoer may be fully protected without reference to any indemnity for the Government's loss.[15] It is rather a liability the principal, if not the only, effect of which would be to make whole the federal treasury for financial losses sustained, flowing from the injuries inflicted and the Government's obligations to the soldier. The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

We turn, finally, to consideration of the policy properly to be applied concerning the wrongdoer, whether of liability or of continued immunity as in the past. Here the Government puts forward interesting views to support its claim of responsibility. It appeals first to the great principle that the law can never be wholly static. Growth, it urges, is the life of the law as it is of all living things. And in this expansive and creative living process, we are further reminded, the judicial institution has had and must continue to have a large and pliant, if also a restrained and steady, hand. Moreover, the special problem here has roots in the ancient soil of tort law, wherein the chief plowman has been the judge, notwithstanding his furrow may be covered up or widened by legislation.

Bringing the argument down to special point, counsel has favored us with scholarly discussion of the origins and foundations of liabilities considered analogous and of their later expansion to include relations not originally comprehended. These embrace particularly the liabilities created by the common law, arising from tortious in-

[15] See note 5 *supra*.

juries inflicted upon persons standing in various special legal relationships, and causing harm not only to the injured person but also, as for loss of services and assimilated injuries, to the person to whom he is bound by the relation's tie. Such, for obvious examples, are the master's rights of recovery for loss of the services of his servant or apprentice;[16] the husband's similar action for interference with the marital relation, including loss of consortium as well as the wife's services; and the parent's right to indemnity for loss of a child's services, including his action for a daughter's seduction.[17]

Starting with these long-established instances, illustrating the creative powers and functions of courts, the argument leads on in an effort to show that the government-soldier relation is, if not identical, still strongly analogous;[18] that the analogies are not destroyed by any of the variations, some highly anomalous,[19] characterizing

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[16] As to the ancient action for loss of services, existent in Bracton's day, see Wigmore, Interference With Social Relations (1887) 21 Amer. L. Rev. 764; VIII Holdsworth, A History of English Law (2d ed., 1937) 427–430; II *Id.*, 459–464; IV *Id.*, 379–387; Pollock, The Law of Torts (13th ed.) 234–239; Clerk & Lindsell on Torts (8th ed.) 201–212.

[17] Extension of the action *per quod servitium amisit* to domestic relations, upon a fictional basis, took place as early as 1653. *Norton* v. *Jason*, Style 398; see Winfield, Textbook of the Law of Tort (2d ed.) 257.

[18] Analogies are drawn concerning the nature of the relation both on the basis of status, underlying the earlier forms of liability, and on that of its asserted contractual character, in the latter instance to the rather far-fetched extent of regarding the drafted soldier as having entered into a "contract implied in law."

[19] *E. g.*, in the fiction of loss of services involved in the father's action for a daughter's seduction and in the husband's action for loss of consortium. Compare Serjeant Manning's oft-quoted statement that "the *quasi* fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers." Note to *Grinnell* v. *Wells*, 7 Man. & Gr. at p. 1044.

one or more of the settled types of liability; and that an exertion of creative judicial power to bring the government-soldier relation under the same legal protection against tortious interferences by strangers would be only a further and a proper exemplification of the law's capacity to catch up with the times. Further elaboration of the argument's details would be interesting, for the law has no more attractive scene of action than in the broad field compendiously labeled the law of torts, and within it perhaps none more engrossing than those areas dealing with these essentially human and highly personal relations.

But we forego the tendered opportunity. For we think the argument ignores factors of controlling importance distinguishing the present problem from those with which the Government seeks to bring it into companionate disposition. These are centered in the very fact that it is the Government's interests and relations that are involved, rather than the highly personal relations out of which the assertedly comparable liabilities arose; and in the narrower scope, as compared with that allowed courts of general common-law jurisdiction, for the action of federal courts in such matters.

We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation. But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities, as *Erie R. Co.* v. *Tompkins* itself witnesses. See also *United States* v. *Hudson*, 7 Cranch 32.

Moreover, as the Government recognizes for one phase of the argument but ignores for the other,[20] we have not here simply a question of creating a new liability in the nature of a tort.[21] For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not coveted by traditionally established liabilities.

Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend, as we have said, securing the treasury or the

[20] That is, in the phase stressing that the question is not to be determined by applying state law, the emphasis is put upon the federal aspect of the case, but in that advancing the thesis of liability for acceptance as the federal rule, stress goes to the tort grounding of the argument.

[21] The Government does not contend that the liability sought has existed heretofore. It frankly urges the creation of a new one. The only decision determining the matter, which has come to our attention, in addition to the cases cited above in note 2, is that of the High Court of Australia in *Commonwealth* v. *Quince*, 68 Com. L. Rep. 227, aff'g, (1943) Q. S. R. 199, denying liability. See also *Attorney General* v. *Valle-Jones* [1935] 2 K. B. 209, reaching a contrary result, in which however the principal issue apparently went by concession.

government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

Moreover Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. The case therefore is not one in which, as the Government argues, all that is involved is application of "a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept. . . ." Among others, one trouble with this is that the situation is not new, at any rate not so new that Congress can be presumed not to have known of it or to have acted in the light of that knowledge.

When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end.[22] We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.

In view of these considerations, exercise of judicial power to establish the new liability not only would be in-

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[22] See, *e. g.*, 35 Stat. 1097, 18 U. S. C. § 94 (enticing desertion from the military or naval service); 35 Stat. 1097, 18 U. S. C. § 95 (enticing workmen from arsenals or armories); 35 Stat. 1097, 18 U. S. C. § 99 (robbery of personal property belonging to the United States); 35 Stat. 1097, 18 U. S. C. § 100 (embezzlement of property belonging to the United States).

Of course it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the sovereign is protected from tortious interference. Thus, trespass on land belonging to the United States is a civil wrong to be remedied in the courts. *Cotton* v. *United States*, 11 How. 228.

truding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid,[23] not only here but in the many other cases we are told may be governed by the decision.

Finally, if the common-law precedents relied on were more pertinent than they are to the total problem, particularly in view of its federal and especially its fiscal aspects, in none of the situations to which they apply was the question of liability or no liability within the power of one of the parties to the litigation to determine. In them the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed. Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

[23] Necessarily such an element or effect often, if not always, exists whenever a new liability is created, as at common law, in the nature of responsibility for tort. This, however, could not be made an invariably controlling consideration in cases presenting common-law issues concerning such liabilities to tribunals whose business it is primarily to decide them, for to do this would forestall all growth in the law except by legislative action. The factor, however, is one generally to be taken into account and weighed against the social need dictating the new responsibility, in cases squarely presenting those issues and not complicated, as this case is, by considerations arising from distributions of power in the federal system.

SUPREME COURT OF THE UNITED STATES

No. 235.—October Term, 1946.

The United States of America, Petitioner, v. Standard Oil Company of California and Ira Boone.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 23, 1947.]

Mr. Justice Jackson, dissenting.

If the defendant in this case had been held liable for negligently inflicting personal injuries on a civilian, it would have been obliged to pay, among other items of damage, the reasonable cost of resulting care by his doctor, hospital and nurse, and the earnings lost during the period of disability. If the civilian bore this cost himself, it would be part of his own damage; if the civilian were a wife and the expense fell upon her husband, he would be entitled to recover it; if the civilian were a child, it would be recoverable by the parent. The long-established law is that a wrongdoer who commits a tort against a civilian must make good to somebody these elements of the costs resulting from his wrongdoing.

What the Court now holds is that if the victim of negligence is a soldier, the wrongdoer does not have to make good these items of expense to the one who bears them. The United States is under the duty to furnish medical services, hospitalization and nursing to a soldier and loses his services while his pay goes on. These costs, which essentially fall upon the United States by reason of the sovereign-soldier relationship, the Court holds cannot be recovered by the United States from the wrongdoer as the parent can in the case of a child or the husband can in the case of a wife. As a matter of justice, I see no

reason why taxpayers of the United States should relieve a wrongdoer of part of his normal liability for personal injury when the victim of negligence happens to be a soldier. And I cannot see why the principles of tort law that allow a husband or parent to recover do not logically sustain the right of the United States to recover in this case.

But the Court has qualms about applying these well-known principles of tort law to this novel state of facts, unless directed to do so by Congress. The law of torts has been developed almost exclusively by the judiciary in England and this country by common law methods. With few exceptions, tort liability does not depend upon legislation. If there is one function which I should think we would feel free to exercise under a Constitution which vests in us judicial power, it would be to apply well-established common law principles to a case whose only novelty is in facts. The courts of England, whose scruples against legislating are at least as sensitive as ours normally are, have not hesitated to say that His Majesty's Treasury may recover outlay to cure a British soldier from injury by a negligent wrongdoer and the wages he was meanwhile paid. *Attorney General* v. *Valle-Jones* [1935] 2 K. B. 209. I think we could hold as much without being suspected of trying to usurp legislative function.